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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

NATIONAL AMERICAN INSURANCE
COMPANY OF CALIFORNIA,

Plaintiff and Respondent,

v.

CENTURY SURETY COMPANY,

Defendant and Appellant.

B140157

(Super. Ct. No. BC189155)

APPEAL from a judgment of the Superior Court of Los Angeles
County, Ernest M. Hiroshige, Judge. Reversed and Remanded.

O'Hara, Nardi & Barnes, Callie C. O'Hara and Denise A. Nardi for
Defendant and Appellant.

Cotkin, Collins & Ginsburg, Terry C. Leuin and Douglas A. Greer for
Plaintiff and Respondent.

Appellant Century Surety Company (Century) appeals from the
summary judgment entered in favor of respondent National American Insurance
Company of California (NAICC). We reverse the judgment and remand to the trial
court with instructions.

FACTUAL AND PROCEDURAL BACKGROUND

Sometime during the late 1980s and early 1990s, Brian Larrabure worked as a framing subcontractor on a multi-unit condominium project in Reseda (the Project). At various times, Larrabure had done business as an individual (hereinafter referred to as Individual) or as two different corporate entities, Brian Larrabure Framing, Inc. (hereinafter referred to as Framing Inc.) and Brian A. Larrabure Construction, Inc. (hereinafter Construction Inc.) To further complicate matters, Framing Inc. sometimes did business as Brian Larrabure Construction.¹

In December 1993, the Project's homeowners' association filed a construction defect action against the developers and others in Los Angeles Superior Court (case No. BC094940, hereinafter referred to as the Underlying Action). The general contractor of the project answered, and on October 4, 1995, filed a cross-complaint against a number of subcontractors, including Construction Inc.²

From 1989 through 1998, the Larrabure entities were insured by eight different insurance companies. NAICC insured Individual, for the period from March 14, 1990, to December 2, 1990. Scottsdale Insurance Company issued policies to Framing Inc. covering the period from September 1, 1989, to September 1, 1991. Century insured Framing Inc. under two successive commercial general liability policies effective December 2, 1993, to December 2, 1995.

Apparently after it had issued these policies to Framing Inc., Century learned that Construction Inc.'s corporate powers, rights, and privileges had been

¹ When necessary, we shall refer to the three entities collectively as the Larrabure entities.

² It does not appear from the record whether Individual or Framing Inc. were ever named as parties in the Underlying Action.

suspended since May 3, 1993, by the California Secretary of State for failure to file tax returns or to pay franchise taxes, pursuant to section 23302 of the Revenue and Taxation Code.

On August 29, 1997, Century notified Scottsdale and NAICC that it was withdrawing from the defense of the Underlying Action “for want of coverage.” Century then filed an action on September 3, 1997, against Construction Inc. for rescission (the Rescission Action).

In October 1997, a mediation of the Underlying Action was conducted. At the mediation, a settlement was reached whereby NAICC and Scottsdale agreed to jointly pay the Project’s homeowners’ association the sum of \$200,000 on Construction Inc.’s behalf and Construction Inc. would stipulate to entry of a \$2 million judgment, with the homeowners’ association agreeing that it would not seek to enforce that judgment against any of the Larrabure entities, NAICC or Scottsdale. The homeowners’ association would be, however, left free to enforce that judgment against the Larrabure entities’ other insurers. Before the court heard a motion for determination of the good faith of the settlement agreement, Construction Inc. withdrew its consent to the agreement.

In January 1998, Century reached a negotiated settlement of the Rescission Action with Framing Inc. and Construction Inc. in which Century agreed to reimburse all premiums paid by Framing Inc. as well as agreeing to pay additional financial consideration, in exchange for which Construction Inc. and Framing Inc. agreed to release Century from all liability under its policies.³ Century then dismissed its Rescission Action on February 4, 1998.

³ In the agreement, it was admitted that Construction Inc. had been insured by Century under the name Framing Inc.

On April 9, 1998, NAICC filed this action (the Indemnity Action), seeking contribution, subrogation and indemnification for the defense and settlement of the Underlying Action. Named as defendants were seven insurance companies (including Century), Construction Inc. and Individual.

Century answered, asserting 46 affirmative defenses. In its 43rd, 44th and 45th affirmative defenses, it asserted that all of its relevant policies had been rescinded by mutual agreement with the insured.

On April 1, 1999, NAICC filed a motion for summary adjudication in the Indemnity Action on the grounds that Century had no right to rescind its policies with Framing Inc. and that therefore it could not assert its 43rd, 44th and 45th affirmative defenses.

Century filed a motion for summary judgment in the Indemnity Action on April 15, 1999, on the grounds that the policies held by Construction Inc. were mutually rescinded by the parties. In the alternative, Century moved for an order granting summary adjudication that it had no contractual duty to defend or indemnify the Larrabure entities in the Underlying Action and that NAICC was not entitled to equitable contribution.

Both NAICC's motion for summary adjudication and Century's motion for summary judgment were set for hearing on May 13, 1999.

The Hearing on the Motions

At the hearing on the two motions, the judge indicated that it had issued tentative rulings and asked the parties for their responses.⁴ Counsel for Century stated, "Counsel and I have spoken about both of the tentative rulings, and we both agreed that there really are no disputed facts that we can identify that

⁴ The court's tentative rulings are not in the record, but apparently were to deny the

would preclude the court from issuing a legal ruling. [¶] *We feel that whether or not the rescission of Century Surety's policies is effective as concerns NAICC's rights of contribution and subrogation is a legal question based on the facts involved.*" (Italics added.)

The following colloquy ensued: "THE COURT: So do you think one or the other is meritorious? [¶] [Counsel for Century]: Yes. [¶] [Counsel for NAICC]: Yes. [¶] THE COURT: Both sides agree to that? [¶] [Counsel for Century]: Yes. . . . [¶] [Counsel for NAICC]: *And also, we can't really think of any additional factual disputes that need to be resolved in order to affect the outcome of a ruling on this.* [¶] . . . Basically, we disputed one of the material facts set forth in their separate statement that said that the rescission was effective. And our opposition to that was based upon about three or four of our undisputed material facts which were not disputed. [¶] *So what we're looking at here is, what are the impact of a certain group of facts on the outcome of this rescission agreement.* I think there is not much more we can add to that. And to try it would be -- it would seem to me would be kind of wasteful. [¶] . . . [¶] There may be some additional briefing that you would like to have to help you reach these issues, and we are more than glad to do that." (Italics added.)

The court then indicated that it would take the matter under submission but the parties then proceeded to argue the legal issues of subrogation and rescission. Counsel for NAICC then interposed a question about the tentative ruling which suggested there was a triable issue of fact whether NAICC had "sustained a sufficient injury to disallow the rescission." The court agreed to allow NAICC to file a supplemental declaration proffering evidence on that issue,

motions.

namely the invoices reflecting attorneys fees incurred, and the hearing was concluded.

On August 31, 1999, the court issued a written ruling which stated that it was granting NAICC's "*motion for summary adjudication*" and denying Century's "*motion for summary judgment*." (Italics added.) It stated: "Each party in this matter has agreed that the facts in each motion that are material to deciding this matter are undisputed. As none of the facts are in dispute, both parties have agreed that the Court should issue a legal ruling in this matter. Accordingly, the Court now does so." It then proceeded to discuss the legal authorities cited by the parties, and concluded in the following manner; "[NAICC] has made a sufficient showing that it is inequitable to allow [Century] to rescind its insurance policy after it had notice of the Larrabure action. On this basis, [NAICC's] motion is granted, and [Century's] motion is denied. As none of the facts are disputed in this matter, [NAICC] *is entitled to judgment* in the amount of \$228,114.30, which represents the total amount of fees it paid in defense of Larrabure. [¶] The Court adopts the reasoning of [NAICC's] moving, reply, and supplemental papers that are consistent with the holdings of this ruling." (Italics added.)

An accompanying minute order entered by the clerk, however, stated as follows: "[NAICC's] *motion for summary judgment* is granted. In granting the motion, the Court adopts [NAICC's] moving, reply, and supplemental papers that are consistent with the Court's analysis. [NAICC] is awarded \$228,114.30. [¶] [Century's] motion for summary judgment is denied." (Italics added.)

NAICC then submitted a proposed order which referenced the court's written ruling, stating "that summary judgment be granted in favor of plaintiff NAICC and against defendant Century. . . ."

On October 7, 1999, Century filed an objection to the proposed order submitted by NAICC on the grounds that NAICC's motion was only for summary

adjudication of the rescission issue and therefore that NAICC was not entitled to judgment. NAICC filed opposition to the objection on the grounds that objection was untimely and on the grounds that Century had invited the error or waived its objection to the ruling.

The court signed the proposed order on November 3, 1999. Judgment was entered on January 25, 2000, and this appeal followed.

DISCUSSION

1. Did the Court Properly Grant Summary Judgment?

The first contention we deal with is whether it was procedurally proper for the court to enter summary judgment in favor of NAICC when NAICC's motion only requested summary adjudication of certain issues, i.e. whether Century was entitled to assert the affirmative defense of rescission. When we review a summary judgment, we will affirm if there are any grounds upon which the judgment was proper, even on a ground not raised by the moving party, provided that the opposing party had an opportunity to respond. (*Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1481; *Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 70-73.)

Here, contrary to NAICC's assertions, it does not appear that Century invited the error or impliedly agreed to the entry of final judgment. Our review of the transcript of the hearing compels the conclusion that the parties agreed only that the legal issue of whether the rescission agreement was valid did not require resolution of a factual dispute. The trial court apparently misinterpreted their agreement over this issue as an agreement that there were no other legal issues to be decided in the action.

Moreover, we do not find that NAICC met its burden of proving the absence of any triable issue relating to any of the causes of action in the Indemnity

Action. In its complaint, NAICC named as defendants Century, Scottsdale Insurance Company, Illinois Insurance Exchange, American International Specialty Lines, Ranger Insurance Company, First Financial Insurance Company, Reliance Insurance Company, Individual, and Construction Inc. The complaint alleged that NAICC only insured Individual, and thus it was not obligated to defend or indemnify Construction Inc. It sought a declaration that NAICC was not obligated to defend or indemnify Individual or Construction Inc., and that defendant insurers had not paid their proportionate share of the expenses incurred by NAICC in defending the Underlying Action. It also requested equitable contribution from all the defendant insurers, claiming that it was entitled to reimbursement for its contribution towards the defense of Construction Inc. in an amount as the court deemed fair and equitable. It sought equitable indemnity for the net sums paid by it to defend or settle the underlying action and subrogation on the grounds that the defendant insurers had an obligation to pay a portion of defense and/or settlement costs paid by NAICC. The remaining cause of action was for breach of contract against Individual and Construction Inc.

In its separate statement of undisputed facts, NAICC addressed only the purported rescission of Century's policies and asserted that there was no merit to Century's 43rd, 44th or 45th affirmative defenses. It did not address the respective rights or defenses of any of the other insurers named as defendants in the Indemnity Action or the equities among the various insurers.

In its supplemental brief submitted after the hearing on the motions, NAICC alleged that it had incurred a total of \$108,114.30 in defense costs. NAICC requested indemnification from Century for this entire amount, or in the alternative, equitable contribution from Century to the extent that NAICC paid more than its fair pro rata share (one-fourth) of the defense costs. Then NAICC alleged it paid \$120,000 in settlement of the Underlying Action and stated that it

sought full reimbursement of that amount, or in the alternative, equitable contribution from Century “who failed to pay any of its one-half pro rata share of the settlement. . . .”

NAICC described the nature of the dispute as follows: “[T]he dispute focuses upon whether, under the facts as set forth in the parties’ separate statements of fact, the attempt by [Century] to rescind its policies issued to . . . FRAMING INC. . . . was effective to cut off [NAICC’s] rights to equitable indemnity, contribution and/or subrogation.”

In reply to NAICC’s supplemental brief, Century submitted a brief which reiterated its legal arguments with respect to the rescission of its policies and stated that the only rights of contribution and subrogation which arguably survived were a pro rata share of defense costs incurred from the date of Century’s withdrawal from the defense of the Underlying Action on September 5, 1997, to the date of the mutual rescission agreement, January 29, 1998. According to NAICC’s papers, that amount was \$11,153.83. Century conceded that the only judgment that could be entered should be for its “pro rata” share of that amount, but did not specify what the pro rata share should be.

The trial court ruled that NAICC was entitled to judgment in the amount of \$228,114.30, which was the total amount of defense costs incurred by NAICC plus the total settlement paid by NAICC.

It appears that in its ruling, the trial court adjudicated the rights and equities among all the defense insurers despite the fact that NAICC’s motion only sought an adjudication that Century could not assert the affirmative defense of rescission. There were no facts before the court in either of the motions which addressed the liability of all of the Larrabure entities’ other insurers for the costs of settlement or the costs of defense. Moreover, there was nothing before the court in either motion which addressed the validity of Century’s other affirmative defenses

to the Indemnity Action. Finally, nothing was asserted which established that Century was liable for the entire amount paid by NAICC to settle the Underlying Action. Thus, summary judgment should not have been granted.

2. *Was NAICC Entitled to Summary Adjudication?*

Despite our conclusion that *judgment* was entered in error, we find that the trial court did rule correctly that Century was not entitled to assert rescission as a defense to NAICC's request for subrogation and indemnity.

In *Angle v. United States Fid. & Guar. Co.* (1962) 201 Cal.App.2d 758, a homeowner obtained an insurance policy for \$17,000 coverage on her residence. Unbeknownst to her, the holder of the first deed of trust on the residence had obtained another policy with another insurance company for \$10,000 on the residence. Shortly after the homeowner obtained the \$17,000 policy, a fire occurred. Both policies were in full force at the time of the fire. The homeowners' insurance company took it upon itself to offer the homeowner another policy in place of the one it had previously issued, which provided for only \$7000 coverage on the house. The insurance company represented to the homeowner that no reduction in recovery would occur by the rescission of the first policy and issuance of the replacement policy. The court of appeal held that there could be no rescission of the homeowner's insurance policy after the event giving rise to the liability had occurred, because the effect of that rescission would be to increase the pro rata liability of the trust deed holder's insurance company. (*Id.* at p. 761.)

Several years later, *Spott Electrical Co. v. Industrial Indem. Co.* (1973) 30 Cal.App.3d 797 disapproved of some of the language used in *Angle*. In *Spott*, however, the situation was quite different from *Angle*. There, a broker had mistakenly placed insurance with two different companies, and had no intent to secure double coverage. The court in *Spott* stated: "*Angle* is clearly

distinguishable from the case at bench for the reason that there two different entities, each intending to insure its own interest, ordered separate coverage. . . . But the major distinction between *Angle* and the present case is that here an agent fully authorized to act for the insureds ordered [one insurance company's] binder cancelled flat, whereas in *Angle* one company acted unilaterally in issuing a policy for \$10,000 less than its binder, and misled the plaintiff into believing that her interests would not be affect adversely. It was a flagrant effort to reduce [that insurance company's] pro rata share of the loss. . . . [¶] We agree entirely with the result reached in *Angle* but disagree with some of the language contained therein, unnecessary to the decision, to the effect that an insurance company has a 'right' to prorate its liability and that such right vests upon the occurrence of an event that gives rise to a claim or potential claim. The application of such rule to the case at bench would lead to an absurdity. [¶] . . . [¶] The case boils down to this . . . must an insured keep coverage it does not want or need merely to afford contribution rights to an insurer that accepted a full premium for full coverage without any expectation of, nor right to expect, contribution from anyone?" (*Id.* at p. 807.) Therefore, it appears that the holding in *Spott* is not applicable at all to the situation presented here, and that *Spott* only disapproves of dicta in *Angle*.

Century also cites the case of *Truck Ins. Exchange v. Superior Court* (1997) 60 Cal.App.4th 342 for the proposition that an insurer cannot be subrogated to an insured's rights against other insurers if that insured did not have a valid contract of insurance. In *Truck*, an insurance company which sought to intervene in the rescission action of another insurance company, filed a petition for writ of mandate after its motion to intervene was denied by the trial court. As in this case, the insured was a corporation which had been suspended for failure to file tax returns. The corporation did not answer or otherwise make an appearance in the rescission action. The court of appeal granted the petition on the grounds that if

the company were not allowed to intervene, it would be confronted with default judgments of rescission and thus be barred from pursuing equitable contribution from the other insurers. (*Id.* at p. 348.)

We are not faced with the situation presented in *Truck*. After Century filed its Rescission Action, it entered into a settlement agreement with Framing Inc. and Construction Inc. It then dismissed the Rescission Action. Neither NAICC nor Scottsdale sought leave to intervene because they aided Construction Inc. in reviving its corporate status.

Here, Century did not seek to rescind the policies it issued in 1993 until after work on the Project had been completed and four years after the Underlying Action was filed. Pursuant to the reasoning in *Angle*, the rights of the Larrabure entities' other insurers would be prejudiced by Century's belated rescission. Therefore, we conclude that NAICC was entitled to summary adjudication on the issue of Century's purported rescission.

DISPOSITION

The judgment entered in favor of NAICC is reversed and the matter is remanded to the superior court with instructions to vacate its order granting summary judgment and with instructions to enter a new and different order for summary adjudication in favor of NAICC on the grounds that Century is not

entitled to assert its 43rd, 44th and 45th affirmative defenses to NAICC's complaint. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED

HASTINGS, J.

We concur:

VOGEL (C.S.), P.J.

EPSTEIN, J.